91-1919

Case No. _____

FILED
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SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,

Defendant.

PETITION for Writ of Certiorari
to the United States Court of Appeals
for the Ninth District

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Courts can mandate the use of an employer-dominated "quality circle" as the exclusive bargaining "representative" of a Railway Labor Act "employee" who holds his employment via an individual contract of employment even though that "employee" had properly terminated any agency relationship with this employer-dominated "representative"?

2. Is the January 31, 1992 Order from the Ninth Circuit that mandated that SOWERS (and all flight crewmembers) must use an employer-dominated "quality circle" as their exclusive bargaining agent in violation of the Railway Labor Act, Section 2 Third and Fourth (45 USC 152 Third, Fourth)?

3. Does the January 31, 1992 order from the 9th Circuit, in fact and effect, "certify" an employer-dominated "quality circle" as the exclusive "representative" of

SOWERS (and all other the flight crewmembers) in violation of the Railway Labor Act (45 USC 152, Third, Fourth and Ninth)?

LISTING OF ALL PARTIES TO THE PROCEEDING

1. Plaintiff: Richard M. Sowers
2. Defendant: Federal Express Corporation

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1. Opinion of court delivered by the Hon. Bruce R. Thompson, presiding judge, United States District Court, District of Nevada, granting Summary Judgment for Defendants; October 25, 1990.

2. Memorandum of Opinion denying appeal, before the Hons. Sneed, Schroeder and T. G. Nelson, Circuit judges for the United States Court of Appeals for the Ninth Circuit; January 30, 1992.

3. Order denying request for re-hearing and suggestion for re-hearing en banc by the Hons. Sneed, Schroeder and T. G. Nelson, Circuit judges, dated March 31, 1992.

STATEMENT OF JURISDICTION

Date of the entry of judgment sought to be reviewed: January 30, 1992. Denial of appeal by the United States Court of Appeal for the Ninth Circuit from the granting of a Summary Judgment Motion in the United States District Court for the District of Nevada.

Petition for re-hearing with suggestion for re-hearing en banc was denied by the United States Court of Appeals for the Ninth Circuit on March 31, 1992.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of 28 USC 1254(1), Rules of the U. S. Supreme Court, Rule No. 10.

PERTINENT STATUTORY PROVISIONS INVOLVED IN THE CASE

45 USC, Section 151 and 2.[1]

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[1] Because this statutory section is lengthy, SOWERS provides the citation in this section with the full text included in

STATEMENT OF THE CASE

1. Factual Background

SOWERS is a Federal Express pilot who holds his employment via an individual contract of employment, the material terms and conditions of which are memorialized in a document called the Flight Crewmembers' Handbook (FCH); this fact being stipulated to by both parties. This individual contract (the FCH) contained provisions for modification via a revision process (see Appendix, Excerpt from Pre-Trial Order) wherein SOWERS was to be represented by a revocable agent, an employer-dominated organization called the Flight Advisory Board (FAB), an organization that was the child of Federal Express management and whose $1.1 million budget is paid completely by Federal Express and which was comprised of Federal Express pilots.

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the Appendix, Tab D.

Succinctly put, all revisions to the FCH, SOWERS' individual contract of employment, were to be made by SOWERS' revocable agent, the FAB, in a written FCH process (Appendix) wherein the FAB would consult/advise with Federal Express management concerning the particular revision.

In July, 1989, SOWERS properly terminated his revocable agency with the employer-dominated FAB with proper notice to both the FAB and to Federal Express; this also being a stipulated fact between the parties.

The particular revision or modification to the FCH that SOWERS objected to the FAB acting in his stead essentially provided that, in the event of a Federal Express merger with another airline employing pilots, said other airline pilots would be "tail-ended" in seniority behind present Federal Express pilots. Federal Express

management suggested that the FCH be revised so that the pilots acquired from Flying Tiger during the merger process would be "dove-tailed" rather than "tail-ended" in seniority positions. The net result of this "dove-tailing" was that SOWERS would lose approximately 600 seniority positions if his individual contract of employment was modified.

SOWERS' purpose in firing the FAB was to preserve his pre-existing individual contractual rights (his pilot seniority position).

Particularly offensive to SOWERS (and all other flight crewmembers) was the fact that the pre-existing individual contractual right in question, whereby he was assured of seniority "tail-ending", had previously been the result of a bargained-for exchange wherein Federal Express was allowed to operate aircraft up to fifty thousand pounds with non-Federal Express crewmembers in

exchange for seniority "tail-ending" assurance, if the company, in the future, should ever merge with another airline.

Subsequent to, and in accordance with this 1988 bargained-for exchange Federal did, in fact, operate aircraft up to fifty thousand pounds and did reap the benefit via this partial performance of the contract. On December 16, 1988, Federal and Tiger International entered into an agreement and plan of merger. As part of that agreement, Federal voluntarily assumed the Federal Express-Flying Tiger Labor Protective Provisions (LPP's) (Appendix) Section 3, which agreed, in direct contradiction to the already-existing (and partially performed) individual contract of employment of SOWERS, to "dove-tail", or integrate, the seniority lists of the flight crewmembers.

After terminating his agency with the employer-dominated FAB, SOWERS sued for (among other things) anticipatory breach of

contract in the United States District Court, District of Nevada, to preserve his pre-existing contractual rights.

Pursuant to a Motion for Summary Judgment by Federal Express, the District Court granted said motion and entered an order of judgment thereupon on November 5, 1990 (see Appendix).

SOWERS appealed this judgment on November 27, 1990, to the United States Court of Appeals for the Ninth Circuit, which heard arguments on January 13, 1992 and ruled on January 30, 1992 (see Appendix), ruling (which ruling singularly prompted this Writ) that "the FCH was at all times amendable, according to its terms, with or without SOWERS' individual consent", and when "SOWERS notified the FAB that he had 'terminated his agency with them' SOWERS removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved

revision committee can bind SOWERS to FCH revisions"; thus creating the specific issue that is the subject of this Petition for Writ of Certiorari. Can the Federal Courts do indirectly that which the NMB can only do after scrupulous adherence to its rules that, among others, require a majority vote prior to an organization becoming an exclusive bargaining agent?

2. Basis for federal jurisdiction in the Court of First Instance.

The Federal District Court, District of Nevada, had diversity jurisdiction under 28 USC 1332(a), in that Federal Express Corporation is a citizen of a state other than the state of citizenship of SOWERS and the amount in controversy exceeds one million dollars, excluding interest and costs; and under 28 USC 2201 for declaratory relief.

Venue is proper in the Nevada District Court because of the provisions of 28 USC

1391(a) in that SOWERS, the sole Plaintiff, was (is) a resident within the jurisdictional limits of the United States District Court, District of Nevada.

The basis for claiming that the judgment appealed from is final is Federal Rule of Civil Procedure, Rule 56; 28 USC 1291.

ARGUMENT

1. SOWERS requests that the United States be allowed to express its views concerning the issues presented for appeal in this matter, i.e., a court-mandated, exclusive bargaining agent for an RLA "employee". SOWERS requests that the solicitor general be offered the opportunity to present the position of the United States in this most important, fast-emerging and unsettled area of law.

2. The Ninth Circuit Court of Appeal, in its ruling, by holding that SOWERS could not "fire" the employer-dominated FAB as his agent and that revisions to SOWERS' admittedly individual contract of employment could only be made by the employer-dominated FAB with or without SOWERS' consent essentially accomplished without the election or certification process required by the Railway Labor Act, Section 2, Third, Fourth and Ninth (45 USC Section 152, Third,

Fourth and Ninth) which state in pertinent part:

> Fourth:
>
> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act....and it shall be unlawful for any carrier... to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining...

and Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the

> requirements of this act, ...the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this act.

SOWERS contends, in this case of first impression, that it is solely and exclusively within the jurisdiction of the Railway Labor Act and the National Mediation Board to determine who, if anyone, should have the power to be his exclusive, collective bargaining agent; not the Federal courts via a two-page Order.

The heart of the issues lies in paragraphs Third, Fourth and Ninth of Section Two (45 USC Section 152) which, like the rest of the Railway Labor Act, are administered by the National Mediation Board. Paragraph Ninth sets forth the exclusive jurisdiction of the Board to certify the name or names of individuals or

organizations who are the authorized and designated bargaining representatives.

Indeed, once the Board has made the determination of an employee's choice of representative, if any, it then issues a written certification declaring that person or organization as the designated and authorized representative. The Act, in Section 2 Ninth, further states: "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." (Underlineation added for emphasis.) Here, the Ninth Circuit has forced SOWERS (and all other flight crewmembers) to "treat" with the employer-dominated FAB.

The Supreme Court sanctioned this authority in a 1937 decision.[2] The Federal courts defer to the National

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[2] Virginia Ry v. System Federation No. 40 300 U.S. 515 (1937).

Mediation Board in the exercise of its administrative authority more than to most administrative agencies. This fact is fundamental to an understanding of representation matters under the Railway Labor Act. One of the early leading cases in administrative law established the principle that Congress and the Railway Labor Act has left to the discretionary authority of the National Mediation Board the determination of eligible voters, the determination of craft or class bargaining units and the certification of representatives.[3]

A plethora of decisions by the Supreme Court and lower Federal Courts since Switchmen's Union has adhered consistently to the view that the Board has non-reviewable discretion in the performance of its duties in representational disputes,

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[3] Switchmen's Union v. National Mediation Board 320 U.S. 297 (1943).

even if Board action is allegedly arbitrary or denies due process.[4] It is still a truism that decisions and determinations of the National Mediation Board in resolving representation disputes under Section 2 Fourth and Ninth are discretionary and essentially non-reviewable by the Courts.

The bottom line is that the anomalous sum total of the Switchmen's Union cases and their progeny may be stated as follows: the National Mediation Board has a limited role in representation matters under the act but its discretion is virtually unlimited in the performance of that role.

Unlike the National Mediation Board, the Federal Court system (here, the Ninth Circuit) jurisdictionally and administratively is precluded from

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[4] Board of Rwy & SS Clerks v. United Transport Service Employees of America 137 F.2d. 817 (DC Cir., 1943 rev'd. per curiam 320 U.S. 715 1943; Decker v. Linea Aeropostal Venezolana 258 F.2d. 153 (DC Cir., 1958; Ruby v. American Airlines, Inc. 323 F.2d. 248 (2d.Cir., 1963).

accomplishing the requisite investigation to determine to either establish a crafts or class and/or determine the designation and recognition of representatives for collective bargaining purposes. Nor did the Ninth Circuit, in this case, even attempt such a process; rather, the Ninth Circuit, by its January 30, 1992 two-page Order, without cite to authority, both stripped SOWERS of his long-established and fundamental contractual right to terminate a revocable agent but, more importantly, it exceeded its jurisdiction by essentially annointing this employer-dominated "quality circle" (the FAB) with all of the rights of an exclusive collective bargaining unit under the Railway Labor Act but without any of the safeguards and responsibilities.

The crux of this request for certiorari is that all Federal Express pilots, who hold their employment via an individual contract, are now forced into using an employer-

dominated "quality circle" (the FAB) as their representative; this "representative" neither being a "representative of [their] own choosing" (see 45 USC 152 Fourth) nor being determined by a "majority of the craft or class" (45 USC 152 Fourth).

Such a travesty, in effect, sounds the death knell for legitimate organized unions, not only for purposes of the Railway Labor Act (railroads and airlines), but also for all other "employees" who fall under the auspices of the National Labor Relations Act (29 USC 151, et seq.). An employer now, thanks to the Ninth Circuit Court of Appeals' Order of January 30, 1992, may mandate the use of an exclusive bargaining agent and have their mandate enforced by the Federal Court.

Federal Express has admitted that the FAB is in effect an organization that represents the interests of its pilots and the FCH itself details how this

representations process is implemented to change "the rates of pay, rules or working conditions of its employees as a class...." (29 CFR 1204.2) (see Appendix).

SOWERS contends, with vigor, that now Federal Express (because of the Ninth Circuit Order in question) is clearly in violation of the Railway Labor Act (45 USC 151 and/or 152, Fourth and Ninth) and the appropriate implementing provisions of 29 CFR 1204.2, (see supra) and 1204.3, which states in pertinent part: "....Section 5, third, (e) of the Railway Labor Act requires all carriers to file with the National Mediation Board copies of all contracts in effect with organizations representing their employees covering rates of pay, rules and working conditions." SOWERS' individual contract of employment is not on file with the National Mediation Board, as required by this implementing Code of Federal Regulations rule.

Similarly, the Ninth Circuit has turned a blind eye to the requirements of 29 CFR, Section 1205.2, which states, in pertinent part: "The provisions of the Third, Fourth and Fifth paragraphs of Section 2 are by law made a part of the contract of employment between the carrier and each employee and shall be binding upon the parties regardless of any other express or implied agreement between them."

The January 30, 1992 Ninth Circuit Court of Appeal Order has the ultimate effect of requiring SOWERS, an individual contract holder (like all other pilots at Federal Express) to mandatorially use the employer-dominated "quality circle" (the FAB) as his exclusive bargaining agent, without any of the protections available under the Railway Labor Act. SOWERS is prevented by the Ninth Circuit Order from (on the one hand) availing himself of the long-standing fundamental principle of

contract law to terminate this agent[5], the employer-dominated "quality circle" and also (on the other) prevented from availing himself of the protections of the Railway Labor Act, to include... 29 CFR 1202.3, which states, in pertinent part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirement of the Railway Labor Act, it is the duty of the Board upon request of either party to the dispute to investigate the dispute and certify to both

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[5] It was the Ninth Circuit's January, 1992 order that transmogrified this case from a simple contract action into a statutory quagmire from which SOWERS may not be able to escape; i.e., SOWERS now cannot "fire" his agent, the employer-dominated FAB and cannot (because of jurisdictional problems) present his plight to the NMB. He has nowhere to go but to this Court of last resort.

parties in writing, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute and to certify the same to the carrier.

CONCLUSION

Without assistance from this Court, employees are at the mercy of unscrupulous employers who wish to do indirectly that which the Railway Labor Act, and, for that matter, the National Labor Relation Act, prevents them from doing directly; i.e., control who shall be labor's representatives in collective bargaining. The national significance and importance of this quesiton is just currently coming into focus. Both the National Labor Relations Board[6] and the

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[6] Electromation, Inc. & Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1049 & "Action Committees" a party of interest, Electromation, Inc. Employer, and,

National Mediation Board[7] have presently pending before them this very issue, with the only difference being that SOWERS could never have his case heard by the NMB because the Ninth Circuit, by its Order, essentially and unilaterally appointed the employer-dominated FAB as SOWERS' exclusive bargaining agent, without bothering with the formalities required by the RLA. In fact in Electromation, Administrative Law Judge George F. McInerny has made findings of fact and conclusions of law that would indicate a "quality circle" or "action committee" (such as the FAB) are inimical to the ability of labor to organize. The National Mediation Board has yet to rule on the

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Local 1049, Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO Petitioner Cases No. 25-CA-19818 and 25-RC-8676.

[7] Evergreen Int'l Airlines, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Airline Div'n. (IBT) NMB Case Nos. R-6094 and R-6095.

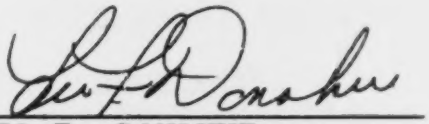
Evergreen case and SOWERS respectfully requests this Court to allow the position of the United States to be made available to this Court to assist in resolving the instant issue.

Where does SOWERS (and all other Federal Express pilots) go for relief, if denied by this Court? In this case of first impression, this Court hopefully can realize and will realize that SOWERS is without a remedy.

Either restore his traditional, contractual right to fire the FAB, his revocable agent, or prevent the Ninth Circuit from doing indirectly that which the NMB cannot do directly without following the proscriptions of the RLA.

DATED: 4/29/92

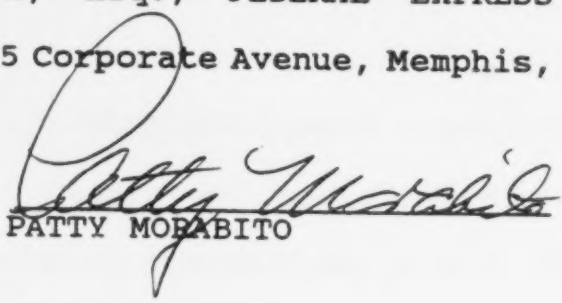
Respectfully submitted,



LEO F. DONAHUE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 1992, a true and correct copy of the foregoing Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to the following: Julien G. Sourwine, Esq., MORTIMER, SOURWINE, et al., P. O. Box 460, Reno, NV 89504-0460; E. Scott Smith, Esq., FORD & HARRISON, 600 Peachtree Bldg., 1275 Peachtree Street, NE, Atlanta, GA 30309; R. Larry Brown, Esq., Clifford Johnson, Esq., FEDERAL EXPRESS CORPORATION, 2005 Corporate Avenue, Memphis, TN 38123.



PATTY MORABITO

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD SOWERS, No. 90-16752

Appellant, D.C. No. CV-89-00474-BRT

v. MEMORANDUM[1]

FED.EXP.CORP.,

Appellee./

Appeal from the United States District Court for the District of Nevada, Bruce R. Thompson, Senior District Judge, Presiding

Argued and Submitted January 13, 1992, San Francisco, California

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

Richard Sowers appeals 1the district court's grant of summary judgment in favor of Federal Express Corporation ("Federal"). We review de novo, Kruso v. International

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Tel. & Tel. Corp., 872 F.2d. 1416, 1421 (9th Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990) and affirm.

We may affirm on any ground finding support in the record. Id. Sowers' employment contract was not breached by repudiation or otherwise. The FCH was at all times amendable, according to its terms, with or without Sowers' individual consent. The revision process concluded on August 4, 1989, in a FAB-approved revision which complied with the FCH revision process. The district court correctly concluded that Federal properly revised Section 1-96 of the FCH before performance was due, and that Sowers' anticipatory breach theory was no more than a fiction.

Furthermore, as the district court explained, Sowers failed to treat the alleged repudiation as a breach by resigning his employment or otherwise putting Federal on notice that he considered his employment

contract to be terminated. The filing of lawsuits by Sowers did nothing to affect his employment contract. We reject Sowers' argument that by continuing this employment with Federal he was merely mitigating his damages. Sowers' arguments are an ad hoc explanation of a series of events which in reality do not support his position.

Sowers would have us believe that because he "fired" the FAB, the modification of the FCH can only be modified pursuant to action of the FAB and Federal management. Sowers notified FAB that he had "terminated his agency with them" Sowers removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved revision committee can bind Sowers to FCH revisions.

We have considered the other contentions of the parties and conclude that no additional discussion is necessary. The

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district court's entry of summary judgment is AFFIRMED.

United States District Court

District of Nevada

Reno, Nevada

RICHARD SOWERS — Docket No.

Plaintiff — CV-N-89-474-BRT

vs.

FEDERAL EXP. CORP. — Reno, Nevada

Defendant/ — October 25, 1990

PORTION OF HEARING ON MOTION FOR SUMMARY JUDGMENT OPINION OF COURT

THE HON. BRUCE R. THOMPSON, PRESIDING

UNITED STATES DISTRICT COURT JUDGE

PROCEEDINGS IN PROGRESS:

THE COURT: It's the order of the Court that summary judgment is granted in favor of Federal Express, the defendant. There isn't any question that Mr. Sowers had a right to file a lawsuit. But he has entered into an employment contract in 1984, which was still in effect, and the mere filing of that lawsuit was not a breach of any contract.

Mr. Sowers' admitted contract -- conduct was in continuance of a performance of the contract that he had entered into in 1984, and not in recognition of any breach of that contract, or termination of it, on anybody's possible theory of termination. The only contract of employment that he had was the one that he entered into in 1984, and that's the contract that he's rendering services under at the present time.

That contract admittedly contained provisions for its amendment, and procedures for its amendment, which admittedly were appropriately followed by all parties in accomplishing the amendment which permitted the merger of Federal Express and Flying Tiger on terms different from those that would have been in effect if Section 196 had not been properly modified.

Inasmuch as Mr. Sowers' employment contract was never terminated, and his assertion that by filing a lawsuit for an

anticipatory breach he had terminated the contract, is fiction, there is no basis for the plaintiff to complain of any breach of contract by the defendant, and that is kwhy summary judgment must be granted.

Do you want to prepare an order, sir? Or maybe you put one in the file, I don't know.

MR. SOURWINE: We put one in the file. There is a proposed order in the file, Your Honor.

THE COURT: Would that be with your original motion? Or...

MR. SOURWINE: I believe so, Your Honor.

THE COURT: What number is it?

THE CLERK: Number 39.

THE COURT: I think you might want to prepare a different one.

MR. SOURWINE: Very well, Your Honor.

THE COURT: You can do that within five days.

MR. SMITH: Yes, Your Honor.

THE COURT: Anything else you want to take up now? We'll be in recess until 2:00 o'clock.

PROCEEDINGS CONCLUDE AT 11:34 AM

(Court is Adjourned)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD SOWERS, No. 90-16752

Appellant, D.C. No. CV-89-00474-BRT

v. ORDER

FED.EXP.CORP.,

Appellee./

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Section 151. Definitions; short title

When used in this Act and for the purposes of this Act-

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban

electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal or a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or

subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other

than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia [United States District Court for the District of Columbia]; and the term "circuit court of appeals [court of appeals]" includes the Court of Appeals of the District of Columbia [United States Court of Appeals for the District of Columbia].

This Act may be cited as the "Railway Labor Act."

Section 152. General Duties

First duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and

by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or

maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agent, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to

join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Ninth. Disputes as to identy of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such

employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized

representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to made copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

(Excerpt from Pre-Trial Order)

15. The FCH contains a Revision Process, which is administered by a Revision Committee consisting of three (3) pilots appointed by the FAB, three (3) management members appointed by the System Chief Pilot, and the System Chief Pilot. Two basic methods are specified in the FCH by which a modification to the terms of the FCH can be effectuated. Under the formal Revision Process, the Revision Committee meets to consider changes that have been proposed. A quorum of five of the six crewmembers, plus the Chief Pilot, is required to conduct the revision process. All crewmembers are thereafter notified of the proposed changes and have three (3) weeks to submit comments to the Revision Committee. After receiving those comments, the Revision Committee determines whether to recommend the changes to the FCH, and any recommended revisions

are sent to the Senior Vice President of Air Operations who decides wheth to accept the recommended revision. Any member of the Revision Committee can appeal the decision of the Senior Vice President of Air Operations to the Chief Operating Officer who, along with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed revision.

16. The other means for revising the FCH is the Bulletin Process. A Notice of Exception Bulletin is used to permit exceptions to the normal FCH procedures to be lmade for single instances where appropriate. At least six (6) of the seven (7) Revision Committee members must endorse the proposed exception in order for it to be sent to the Senior Vice President of Air Operations for approval. The determination of the Senior Vice President of Air Operations to accept or reject the exception can be appealed by any member of the

Revision Committee to the Chief Operating Officer who, acting in conjunction with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed exception.

Supreme Court, U.S.
FILED
JUL 2 1992
OFFICE OF THE CLERK

No. 91-1919

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RICHARD M. SOWERS,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether Petitioner's failure to assert, at any time before filing his Petition for Re-hearing with Suggestion for Rehearing En Banc in the Court of Appeals, that rejection of his common-law theory of anticipatory breach would be tantamount to a violation of Sections 2, Third, Fourth, and Ninth of the Railway Labor Act, 45 U.S.C. §§ 152, Third, Fourth, and Ninth, precludes consideration of that issue in this Court?

2. Whether the questions presented in the Petition are sufficiently grounded in the factual record to permit this Court any meaningful opportunity to review the ruling of the Court of Appeals?

3. Whether the Petition adequately presents any special and important reasons justifying this Court's exercise of discretionary review?

LIST OF PARTIES

The names of all parties to the proceedings in the United States Court of Appeals for the Ninth Circuit appear in the caption of the case in this Court.[1]

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[1] There are no parent companies or subsidiaries (except wholly owned subsidiaries) to be identified pursuant to Supreme Court Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1919

RICHARD M. SOWERS,

Petitioner,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Federal Express Corporation ("Federal Express") respectfully urges denial of the Petition for a Writ of Certiorari to review the judgment and order entered by the United States Court of Appeals for the Ninth Circuit on January 30, 1992.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

No federal or state statute was involved in either the District Court or in Petitioner's appeal to the

Ninth Circuit. In this Court, however, Petitioner raises questions arising under Sections 2, Third, Fourth, and Ninth of the Railway Labor Act, as amended ("RLA"), 45 U.S.C. §§ 152, Third, Fourth, and Ninth. These provisions are set out at pp. 47-51 of the Petition.

COUNTERSTATEMENT OF FACTS AND PROCEEDINGS BELOW NECESSARY TO CORRECT INACCURACIES OR OMISSIONS IN THE PETITION

There is no record support whatsoever for Petitioner's suggestion that his "individual contract (the FCH) contained provisions for modification via a revision process [record citation omitted] wherein SOWERS was to be represented by a *revocable* agent [the FAB.]" (Petition, p. 10) (emphasis in original). The parties stipulated to the role played by the FAB in the FCH revision process (Petition, pp. 52-54), and no mention was ever made of Petitioner's alleged unilateral right to "revoke" the FAB's authority to appoint pilot members to FCH revision committees for the purpose of effecting binding modifications to the FCH agreement. The FAB's authority in that regard is conferred by the contract, not by Petitioner (*Id.*).

Likewise, the record does not support Petitioner's statement to this Court that the FAB is "an organization that was the child of Federal Express management and whose $1.1 million budget is paid completely by Federal Express . . . ." (Petition, p. 10). The record contains neither any allegation nor any evidence addressed to either point. The only evidence adduced below concerning either the origin, the nature, or the operation of the FAB was also the subject of a stipulation between the parties:

> There exists within Federal an elected organization known as the Flying [sic, Flight] Advisory Board (the "FAB"). The FAB is elected by the pilot group and is responsible for, among other things, dealing with management concerning matters of concern to crewmembers.

(Appendix B, p. 8a, ¶ 14). The record is silent as to both the FAB's creation and the amount and source of its budget.

The Petition misinforms this Court that Petitioner "properly terminated his revocable agency with the . . . FAB . . . ; this also being a stipulated fact between the parties." (Petition, p. 11). No such stipulation has ever existed. All matters stipulated to below were set forth in the Pretrial Order entered in the District Court (Appendix B, pp. 5a-11a), and they contain no suggestion that the FAB's authority to appoint revision committee members was either revocable or revoked. (See *Id.*, ¶¶ 1-3, 13-16, 20).

No pleading, motion, brief, or oral argument in the District Court ever raised any question arising under the RLA. (Appendix B, pp. 3a-14a). Nor was the RLA mentioned or considered in connection with any issue Petitioner presented for review by the Ninth Circuit (Appendix C, pp. 15a-16a, "A Statement of the Issues Presented for Review" from Petitioner's Opening Brief to the Ninth Circuit). Petitioner's first mention of the RLA came in his Petition for Re-Hearing with Suggestion for Re-Hearing En Banc, which he presented to the Ninth Circuit on or about February 14, 1992 (Appendix D, pp. 17a-18a). That petition was denied, apparently without any consideration being given to any issue said to arise under the RLA

(Petition, p. 40). Accordingly, neither the District Court nor the Ninth Circuit has considered or passed upon the RLA's applicability, if any, to the facts of this case.

SUMMARY OF ARGUMENT

What began and was decided below as a breach of contract action between parties of diverse citizenship (Petition, p. 15) is presented to this Court as raising far-reaching, if improbable, questions of federal labor policy under the RLA. To pose these questions that were neither raised nor decided below, Petitioner must either distort a detailed, stipulated factual record or create a new one as he goes along. His petition attempts to do both.

Petitioner's thesis turns on the proposition that the Federal Express Flight Advisory Board ("FAB") must be either one of only two things: (1) his "revocable agent," (Petition, pp. 10, 11), or (2) a carrier-dominated labor organization, the existence or maintenance of which violates the RLA. Petitioner's analysis ignores a third possibility: that the individual employment contract into which he entered with Federal Express itself invested the FAB with authority to bind Petitioner to contract modifications.

The record supports only this third alternative (Petition, pp. 52-54) and compelled the conclusion below that, "[a]ccording to its terms, the FCH [Flight Crewmembers Handbook] can only be modified pursuant to action of the FAB and Federal management .... The FAB-approved revision committee can bind

Sowers to FCH revisions." (Appendix A, p. 2a).[2] Accordingly, having stipulated to a record that defeats his breach of contract theory, Petitioner no longer complains of any conduct on the part of Federal Express. Instead, his new complaint is that, on his own appeal, the Ninth Circuit,

> exceeded its jurisdiction by essentially anointing this [now allegedly] employer-dominated 'quality circle' (the FAB) with all of the rights of an exclusive collective bargaining unit [sic, representative] under the Railway Labor Act but without any of the safeguards and responsibilities [required by the RLA.]

Petition, p. 23).

These "issues" formed no part of the case Petitioner alleged, tried, lost, and appealed below. No record exists by which this Court, or any other, could possibly adjudicate the FAB's alleged status as a carrier-dominated labor organization proscribed by the RLA. Such a finding, though, must precede consideration of Petitioner's present lament, that the "Ninth Circuit's . . . order . . . transmogrified this case from a simple contract action into a statutory quagmire . . . ." (Petition, p. 27 n. 5). This case was and remains "a simple contract action," and it properly presents no issue for resolution by this Court.

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[2] Appendix A is the Ninth Circuit's two-page Memorandum also set out at pp. 32-35 of the Petition. We include it here because the Petition's version inadvertently drops an important line from the penultimate paragraph of that court's decision.

REASONS FOR DENYING THE WRIT

I. Neither The Decision Below Nor The Record Raises Either Of The Questions Presented In The Petition.

Each Question Presented in the Petition (pp. 2-3) complains of an alleged disharmony between the lower courts' conclusions that Federal Express did not breach Petitioner's individual contract of employment, on the one hand, and various requirements of the Railway Labor Act, on the other. But the Ninth Circuit decided no such question in this proceeding. Moreover, the record will support no such determination of those issues by this Court.

Like the District Court's decision it affirmed (Petition, pp. 36-39), the Ninth Circuit's decision does no more than hold that Petitioner's "employment contract was not breached by repudiation or otherwise." (Appendix A, p. 2a). As Petitioner has always asserted, and continues to assert, the agreement giving rise to this dispute was "an individual contract of employment" (Petition, p. 10), not a collective bargaining agreement. Thus, the Ninth Circuit had no occasion to consider, and did not consider, any portion of the questions now presented in the Petition. This Court "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n. 6 (1983). As *Kibbe* also states, "[t]hat rule has special force where the party seeking to argue the issue has failed to[raise or preserve it.]" 480 U.S. at 259.

If the writ requested were granted to review the Questions Presented by Petitioner, it would be dismissed as improvidently granted after plenary con-

sideration. *Belcher v. Stengel*, 429 U.S. 118 (1976) (*per curiam*). The linchpin of each of the Questions Presented is the allegation that the FAB is a "carrier-dominated labor organization" maintained in violation of the RLA. But because that assertion lacks any record support whatsoever, the Petition should be denied now, rather than the writ dismissed later. *See EEOC v. FLRA*, 476 U.S. 19, 23 (1986).

Petitioner's Questions Presented assume that the FAB is a carrier-dominated labor organization, but this contention was neither raised nor proved below. That assumption is itself composed of two parts: that the FAB is a "labor organization" and, if it is, that Federal Express "dominates" it.

The RLA treats the subject of "carrier domination" in Section 2, Fourth. That section states, in relevant part, that:

> [I]t shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor,. . . .

45 U.S.C. § 152, Fourth. That section's proscriptions are tied to Congress's concern with eliminating a carrier's "actual interference with the liberty of [its] employees in the selection of their representatives[,]" *Texas & N.O. Ry. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 560 (1930), a concern that has never been implicated in this case.

Safeguards against improper carrier or employer influence over labor organizations are neither new nor arcane. Federal labor policy, as applied by this Court and the courts of appeal, has protected employee rights in this area for over fifty years. *See, e.g.*, Sections 2, Third, and Fourth of the Railway Labor Act, 45 U.S.C. §§ 152, Third, Fourth; Section 8(a)(2) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(2); Section 302(a) of the Labor Management Relations Act, 29 U.S.C. § 186(a); and *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). These concerns are not unknown to the circuit courts and are fully considered when presented in appropriate cases. *See, e.g.*: *Barthelemy v. Air Line Pilots Ass'n*, 897 F.2d 999, 1014-1017 (9th Cir. 1990) (carrier did not violate RLA Section 2, Fourth by assuming labor organization's $1.25 million investment-banking expense); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (no violation of Section 8(a)(2) of NLRA where cooperative employee-management arrangement reflects employee free choice and not management instigation and coercion); *Brotherhood of Ry. & S.S. Clerks v. Virginian Ry. Co.*, 125 F.2d 853, 858-59 (4th Cir. 1942) (describing indicia of carrier domination of labor organization in violation of RLA).

But the "appropriate cases" are those which present factual records upon which the courts can answer two questions: (1) the origin and operation of the employee group in question, *i.e.*, is the group actually a "labor organization" under the relevant statute? and (2) the nature and extent of carrier or employer control, interference, assistance, or influence, *i.e.*, is

the "labor organization" "carrier-dominated?" The record in this case answers neither question.

The only evidence before the District Court and Ninth Circuit concerning the origin and nature of the FAB is found in the parties' one-sentence stipulation describing the FAB as ". . . elected by the pilot group and . . . responsible for, among other things, dealing with management concerning matters of concern to crewmembers." (Appendix B, p. 8a, ¶ 14). What this Court can know about the FAB's function is limited to the single fact that the FAB appoints three of the seven members of FCH Revision Committees for purposes of considering modifications to the FCH contract. (Petition, p. 52). This meager record provides no basis for a determination that the FAB is a "labor organization" under the RLA.

Even less supported is the second prong of the determination Petitioner asks this Court to make. The record contains no evidence whatsoever that Federal Express created, influenced, controlled, or financially assisted the FAB in any way. Petitioner merely asks this Court to accept on faith his suggestion that the FAB is "an organization that was the child of Federal Express and whose $1.1 million budget is paid completely by Federal Express . . . ." (Petition, p. 10). Petitioner did not allege or prove one word of that statement below (Appendix B, pp. 3a-14a), and he cannot properly ask this Court to be the initial arbiter of such significant contentions of fact.

Nowhere present in the record made below are any of the allegations, facts, or findings that must necessarily precede consideration of the Questions Presented in the Petition. The Petition seeks an advisory opinion upon a hypothetical set of assumptions that

has never before been alleged or proved. There is, simply, nothing for this Court to review, and, for this reason alone, the Petition should be denied.

II. The Questions Presented Are Important Only To The Parties, Reflect No Circuit Conflict, And Present No Significant Legal Matter Warranting Resolution By This Court.

Aware that the decisions below that Federal Express did not breach his individual, common-law, employment contract affect only the parties to this case and create no circuit conflict, Petitioner strains to suggest that he raises a question "the national significance and importance of [which . . .] is just currently coming into focus." (Petition, p. 28). He does not explain how this can be so, given the age of the "employer domination" cases, and the asserted "significance" of the issue he raises is all the more reason for this Court not to consider the question on the hypothetical record Petitioner presents. *Mishkin v. New York*, 383 U.S. 502, 512-13 (1966) (writ dismissed as improvidently granted where "far-reaching and important questions tendered . . . are not presented by the record with sufficient clarity to require or justify their decision.")

Petitioner points to two cases now pending before the National Labor Relations Board and the National Mediation Board in which the legality of "quality circles" or "employee involvement programs" is being tested under the NLRA and the RLA.[3] His reliance on these pending cases proves too much.

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[3] One of the pending cases, *Electromation, Inc. & Int'l. Bhd. of Teamsters*, NLRB Case No. 25-CA-19818 ALJ Dec'n (1990), has provoked some recent commentary among members of the

Petitioner himself notes that, in *Electromation*, an administrative law judge "has made findings of fact and conclusions of law that would indicate a 'quality circle' or 'action committee' . . . are [sic] inimical to the ability of labor to organize." (Petition, p. 29). If the agencies charged with administering the NLRA and RLA should determine that "quality circles" are inimical to federal labor policy, the federal courts will have ample opportunity to review those conclusions on properly-developed records. It is precisely the absence of any similar record here that makes this case especially inappropriate for review by this Court.

This case, therefore, presents no significant federal question or other legal matter warranting resolution by this Court. The decision below rests entirely upon the adequate, independent, common-law ground that Petitioner's individual contract of employment "was not breached by repudiation or otherwise." (Appendix A, p. 2a). Because nothing else, or greater, can properly be made of this case, this Court should decline Petitioner's invitation to consider the questions he presents.

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labor-law bar. *Compare*, Bennet D. Zurofsky, "Everything Old Is New Again: Company Unions in the Era of Employee Involvement Programs," 8 *Lab. Law.* (ABA) 381 (1992), *with*, Melvin Hutson, "*Electromation*: Employee Involvement or Employer Domination," 8 *Lab. Law.* (ABA) 389 (1992).

CONCLUSION

For the foregoing reasons, the Petitioner for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-16752

D.C. No. CV-89-00474-BRT

RICHARD M. SOWERS,
Plaintiff-Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the District of Nevada
Bruce R. Thompson, Senior District Judge, Presiding

Argued and Submitted January 13, 1992
San Francisco, California

MEMORANDUM*

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

Richard Sowers appeals the district court's grant of summary judgment in favor of Federal Express Corporation ("Federal"). We review *de novo*, *Kruso v. Inter-*

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

national Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 3217 (1990), and affirm.

We may affirm on any ground finding support in the record. *Id.* Sowers' employment contract was not breached by repudiation or otherwise. The FCH was at all times amendable, according to its terms, with or without Sowers' individual consent. The revision process concluded on August 4, 1989, in a FAB-approved revision which complied with the FCH revision process. The district court correctly concluded that Federal properly revised Section 1-96 of the FCH before performance was due, and that Sowers' anticipatory breach theory was no more than a fiction.

Furthermore, as the district court explained, Sowers failed to treat the alleged repudiation as a breach by resigning his employment or otherwise putting Federal on notice that he considered his employment contract to be terminated. The filing of lawsuits by Sowers did nothing to affect his employment contract. We reject Sowers' argument that by continuing his employment with Federal he was merely mitigating his damages. Sowers' arguments are an ad hoc explanation of a series of events which in reality do not support his position.

Sowers would have us believe that because he "fired" the FAB, the modification of the FCH was invalid as to him. According to its terms, the FCH can only be modified pursuant to action of the FAB and Federal management. Sowers notified FAB that he had "terminated his agency with them." Sowers removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved revision committee can bind Sowers to FCH revisions.

We have considered the other contentions of the parties and conclude that no additional discussion is necessary. The district court's entry of summary judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Case No. CV-N-89-403 BRT

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION;
TIGER INTERNATIONAL, INC.;
THE FLYING TIGER LINE INC.,
a wholly owned subsidiary of TIGER INTERNATIONAL, INC.;

Defendants.

Case No. CV-N-89-474 BRT

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,

Defendant.

PRETRIAL ORDER

Following pretrial proceedings in this cause pursuant to Local Rule 190-3, IT IS ORDERED:

I.

These Cases are actions for injunctive relief and damages sought to remedy Defendant's alleged breach of its

employment contract with Plaintiff, material portions of which are embodied in the Federal Express Flight Crewmembers Handbook ("FCH"). The alleged breach arose out of Defendant Federal Express Corporation's ("Federal") merger with Tiger International, Inc. and its wholly-owned subsidiary, The Flying Tiger Line, Inc. ("Tiger"), on August 7, 1989. On December 16, 1988, as part of its Agreement and Plan of Merger with Tiger International, Inc., Federal voluntarily adopted certain Labor Protective Provisions ("LPPs"). The LPPs require the fair and equitable integration of the seniority lists of the two pilot groups and provide that Federal must arbitrate any challenge to the fairness or equity of that integration. Following that merger, Federal is proceeding with the fair and equitable combination of the former Federal pilot seniority list and the former Tiger pilot seniority list into a single, integrated seniority list.

Plaintiff contends that when, on or about December 16, 1988, Defendant FEDERAL EXPRESS CORPORATION voluntarily entered into Labor Protective Provisions (LPPs) and did other acts as a part of their merger agreement with TIGER INTERNATIONAL/FLYING TIGERS, they did so knowingly and willfully violating a pre-existing individual contractual right contained in the aforementioned 1-96 of the FCH. FEDERAL EXPRESS entered into these LPPs for economic gain in violation of a pre-existing contractual right.

These actions by FEDERAL EXPRESS inevitably caused the loss of 600 to 800 seniority positions for Plaintiff SWOERS [sic] and drastically effected his future earnings, retirement benefits and job satisfaction.

Plaintiff seeks compensation sufficient to protect his expectancy in interest in the underlying contract of employment as partially expressed by 1-96 of the FCH.

Federal contends that Section 1-96 of the FCH was at all times amendable; that the FCH was properly amended.

according to its terms, before the merger of Tiger into Federal; that the contract has not been breached; and that Plaintiff is not entitled to any relief whatsoever. Alternatively, Defendant contends that Plaintiff had knowledge of Federal's intention to comply with the LPPs from on or about December 16, 1988, and knew that such compliance would be inconsistent with his alleged right under FCH Section 1-96; that Plaintiff first informed Federal of his objection to Federal's announced course of action on or about July 14, 1989, three days before he filed the first of these suits against Federal; that between December 1988 and July 1989 Plaintiff knew that Federal was expending great sums of money and amounts of time preparing to comply with the LLPs [sic, LPPs] and that much of that time and money was expended on behalf of Plaintiff and the other Federal pilots; that Federal reasonably construed Plaintiff's silence as his acquiescence to Federal's frequently-announced intentions to comply with the LPPs; and that Plaintiff's conduct amounts to laches and equitably estops him from recovering any damages or other relief from Federal.

II.

This Court has diversity jurisdiction over the subject matter of this action under 28 U.S.C. § 1332(a)(1). Plaintiff is a citizen and resident of the State of Nevada; Federal is a Delaware corporation with its principal place of business in Memphis, Tennessee; and the amount in controversy between the parties exceeds the sum or value of $50,000.00, exclusive of interest and costs.

III.

The following facts are admitted by the parties and require no proof:

1. On July 17, 1989, the Plaintiff filed his initial complaint in the action styled as *Richard Sowers v. Federal*

Express Corporation, Tiger International, Inc. and Flying Tiger Line, Inc., CV-N-89-403-BRT (D. Nev.), claiming that the seniority he had earned while working as a pilot for Federal was being jeopardized by the merger of Flying Tigers and its pilot workforce into Federal Express.

2. According to the Plaintiff, Federal was threatening to integrate the seniority lists of the two carriers in a "fair and equitable manner," in contravention of his contractual right to insist on having all Flying Tigers' flight crewmembers placed at the bottom of any integrated seniority list.

3. The Plaintiff requested injunctive relief as well as $2.5 million in compensatory damages, $5 million for mental distress and an unspecified amount for general damages, punitive damages, actual, consequential and incidental losses and attorneys' fees and prejudgment interest.

4. Plaintiff alleges and Federal agrees that, Plaintiff has an individual contract of employment with Federal, the material terms and conditions of which are governed by the FCH.

5. Section 1-96, added to the FCH in August, 1988, provided:

> In the event the Company acquires or merges with another airline employing Flight Crewmembers, any such crewmembers selected for retention will be awarded seniority in accordance with FCH 1-85, Crewmembers Seniority, with the exception of FCH 1-88 [relating to the relative seniority of crewmembers hired on the same date].

6. Section 1-86 of the FCH stated that:

> Seniority will begin to accrue on the date a pilot is employed by the Company as a crewmember and begins Initial Training and Basic Indoctrination. It will continue to accrue during his entire

> employment period, except as specified in FCH Sections 1-88 and 1-91 [relating to crewmembers assigned to non-flying duty].

7. The FCH contains an internal dispute resolution procedure known as the Guarantee of Fair Treatment Policy ("GFTP") which, had it been invoked in this case, could have resulted in Plaintiff's complaint being finally resolved by a Board of Review consisting of five Federal pilots, three of whom would have been chosen by Plaintiff. Seniority grievances are expressly redressable by the GFTP. Plaintiff was aware of the GFTP procedures and had previously invoked those procedures to resolve an earlier grievance, but he made no attempt to do so in this case.

8. On December 16, 1988, Federal and Tiger International entered into an Agreement and Plan of Merger. As part of that Agreement, Federal agreed to adopt labor protective provisions no less favorable to employees of both carriers than those imposed by the Civil Aeronautics Board in the *Allegheny-Mohawk Merger Case*, 59 C.A.B. 19 (1972).

9. In accordance with that obligation, Federal voluntarily assumed the Federal Express-Flying Tigers Labor Protective Provisions (the "LPPs").

10. Section 3 of the LPPS specifies that:

> Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with Section 13 [providing for final and binding arbitration before a neutral arbitrator selected by the parties].

12. In December, 1988, The Flying Tiger Line, Inc. was a party to a collective bargaining agreement with the Air Line Pilots Association, International, which agreement governed the rules, working conditions, and rates of pay of the Flying Tiger pilots. That agreement required, *inter alia*, that:

> In the event of a consolidation or merger of the business of the Company [Flying Tiger], with the business of another air carrier, the Company, if it is the surviving air carrier, will provide the pre-merger or pre-consolidation Company pilots covered by this Agreement with the labor protective provisions specified by the Civil Aeronautics Board in the Allegheny-Mohawk merger (the "Labor Protective Provisions"). If the Company is not the surviving air carrier the Company shall use its best efforts to cause the surviving air carrier to provide the pre-merger or pre-consolidation Company pilots with the Labor Protective Provisions. . . .

13. At no time prior to three days before he filed his original lawsuit did Richard Sowers tell Federal that he objected to Federal's adoption of the LPPs.

14. There exists within Federal an elected organization known as the Flying [sic, Flight] Advisory Board (the "FAB"). The FAB is elected by the pilot group and is responsible for, among other things, dealing with management concerning matters of concern to crewmembers.

15. The FCH contains a Revision Process, which is administered by a Revision Committee consisting of three (3) pilots appointed by the FAB, three (3) management members appointed by the System Chief Pilot, and the System Chief Pilot. Two basic methods are specified in the FCH by which a modification to the terms of the FCH can be effectuated. Under the formal Revision Process, the Revision Committee meets to consider changes that

have been proposed. A quorum of five of the six crewmembers, plus the Chief Pilot, is required to conduct the revision process. All crewmembers are thereafter notified of the proposed changes and have three (3) weeks to submit comments to the Revision Committee. After receiving those comments, the Revision Committee determines whether to recommend the changes to the FCH, and any recommended revisions are sent to the Senior Vice President of Air Operations who decides whether to accept the recommended revision. Any member of the Revision Committee can appeal the decision of the Senior Vice President of Air Operations to the Chief Operating officer who, along with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed revision.

16. The other means for revising the FCH is the Bulletin Process. A Notice of Exception Bulletin is used to permit exceptions to the normal FCH procedures to be made for single instances where appropriate. At least six (6) of the seven (7) Revision Committee members must endorse the proposed exception in order for it to be sent to the Senior Vice President of Air Operations for approval. The determination of the Senior Vice President of Air Operations to accept or reject the exception can be appealed by any member of the Revision Committee to the Chief Operating Officer who, acting in conjunction with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed exception.

17. On July 15, 1989, T. Allen McArtor, the Senior Vice President for Air Operations at Federal, sent a memorandum to David Sanders, the Chairman of the FAB, and to the other members of the Revision Committee, notifying them of a proposed revision to Section 1-96 of the FCH.

18. Instead of designating the three (3) pilot members to serve on the Revision Committee from the FAB, Sanders sent a memorandum to McArtor, advising him that the FAB refused, at that time, to participate in any man-

ner in a Revision Committee that was considering revising Section 1-96 of the FCH.

19. Managements' Revision Committee Members, acting in the absence of the pilot members from the FAB, thereafter convened and a proposed revision to Section 1-96 was then sent to all crewmembers for their consideration and comments.

20. The Plaintiff then filed his second Complaint, styled as *Richard Sowers v. Federal Express Corporation*, CV-N-89-474-BRT (D. Nev.), contending that the Revision Committee could not adopt a change to the FCH in the absence of the FAB-appointed pilot-committee members. Based on this alleged breach of his contract, the Plaintiff sought $2.5 million in compensatory damages, $5 million for anxiety, mental stress, humiliation and despair, injunctive relief to prevent any revision to the FCH, unless accomplished in accordance with the Revision Process, and his attorneys' fees.

21. At the request of the FAB, the entire Revision Committee, including all FAB-appointed Committeemen, met on August 4, 1989. The Revision Committee agreed to withdraw the proposed revision published for comment on July 15th, and, instead, unanimously approved a Bulletin exception to Section 1-96 of the FCH.

22. Under the terms of that exception, Bulletin 89-25, Section 1-96 is to remain unchanged except that integration of the seniority lists of the Federal and the Flying Tigers flight crewmembers is to be accomplished in a fair and equitable manner in accordance with Sections 3 and 13 of the LPPs. Bulletin 89-25 also requires that, until the integration process has been completed, the pilots of both carriers retain their previous seniority rights, and they are restricted from bidding on one another's aircraft and routes.

23. In conformity with the Bulletin Exception process, Bulletin 89-25 as proposed by the full Revision Committee

was approved by the Senior Vice President of Air Operations on August 4, 1989, before the merger of Flying Tigers into Federal occurred on August 7. At all times since then, Federal has complied with the terms of Bulletin 89-25, and the integration of the seniority lists of the Flying Tigers and the Federal pilots is being resolved by an impartial arbitrator selected by the parties who began hearings on December 7, 1989. To date, Plaintiff has not asserted or complained of any violation of Section 1-96 of the FCH, as modified by Bulletin 89-25.

24. As of the date of this Pretrial Order, Plaintiff has suffered no economic loss whatsoever as a result of the addition of Bulletin 89-25 to the FCH as an exception to the operations of Section 1-96 of the FCH.

25. The offer and acceptance of employment were made while Plaintiff was a resident of Sacramento, California, telephonically and in writing. Subsequently, the FCH was delivered to Plaintiff during his initial training in Memphis, Tennessee.

26. FRED SMITH is the Chief Executive Officer of the FEDERAL EXPRESS CORPORATION.

27. The facts stated above in II regarding jurisdiction.

IV.

The following facts, though not admitted, will not be contested at trial by evidence to the contrary: None.

V.

The following are the issues of fact to be tried and determined at trial:[1]

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[1] Defendant submits that there is no genuine issue of material fact as to Defendant's liability in these cases and, therefore, that there is nothing for a jury to determine. Accordingly, Defendant will move for summary judgment, as to the entirety of both of Plaintiff's complaints, and will serve such motion on or before May 4, 1990.

1. Where is the place of performance of the contract of employment between Plaintiff and Federal?

2. What State has the most significant interest in contacts with the contract of employment between Plaintiff and Federal?

3. Whether or not a breach of the covenant of good faith and fair dealing occurred when Defendant FEDERAL EXPRESS CORPORATION entered into the LPPs, on or about December 16, 1988, with knowledge of the underlying and pre-existing individual contractual rights of Plaintiff, as expressed in 1-96 of the FCH.[2]

4. Did Plaintiff unreasonably delay his claim of breach of his contract of employment with Federal?

5. Did Federal change its position or suffer injury or disadvantage during or as a result of Plaintiff's delay in asserting his said claim?

VI.

The following are the issues of law to be tried and determined upon trial or to be earlier disposed of by motion:

1. Whether the FAB-approved insertion of Bulletin 89-25 into the FCH as an exception to FCH Section 1-96 amounted to a breach of contract?

2. Upon the issue of liability, may the Court properly consider events occurring after the filing of this action but before the merger of Flying Tigers into Federal?

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[2] As noted *infra* in the issues of law, Federal objects to consideration of any issue relating to the covenant of good faith and fair dealing because it has not been pleaded by Plaintiff. Federal further objects to the phrase "pre-existing individual contractual rights" because it implies the FCH "contract" could not be changed in accordance with its terms.

3. Whether Plaintiff's claims for injunctive relief should be dismissed for Plaintiff's failure to join indispensable parties?

4. Whether Plaintiff's claims are barred by Plaintiff's admitted failure to exhaust the contractual remedy of processing a claim under the Guarantee of Fair Treatment Policy contained in the FCH?

5. Whether Plaintiff's claims are barred by laches?

6. Whether Plaintiff is estopped from asserting his claims?

7. Whether Plaintiff has an adequate remedy at law so that he is not entitled to injunctive relief?

8. Whether Plaintiff has properly pleaded a claim for breach of the implied covenant of good faith and fair dealing?

9. Whether Plaintiff is entitled to punitive damages?

10. Whether or not Paragraph 1-96 of the FCH was a pre-existing individual contractual right between Plaintiff and Defendant FEDERAL EXPRESS.

11. Whether or not FEDERAL EXPRESS anticipatorially [sic] breached the aforementioned individual contract of employment when they voluntarily entered into the LPPs with TIGER INTERNATIONAL/FLYING TIGER LINE, INC. on or about December 16, 1988.

12. If this was a [sic] anticipatory breach of Plaintiff's contract of employment as expressed in 1-96 of the FCH, did this breach cause damages to Plaintiff on August 2, 1989, when the instant lawsuit was filed.

13. Whether or not the revisions of the FCH made prior to August 2, 1989, mitigated/negated the

contractual rights of Plaintiff as expressed in Paragraph 1-96 of the FCH.

14. Whether or not any modifications to the FCH, Section 1-96, made after the filing of the instant lawsuit on August 2, 1989 serve to mitigate/negate Plaintiff's damages, if any.

15. The issues of declaratory relief; the Court determining the rights of the parties concerning the provisions of the FCH (individual contract of employment between Plaintiff (employee) and Defendant (employer) vis-a-vis the LPPs which are contrary to the contract of employment entered into between Defendant FEDERAL EXPRESS and TIGER INTERNATIONAL, INC./THE FLYING TIGER LINE, INC.

APPENDIX C

BRIEF OF APPELLANT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL NO. 90-14752

RICHARD M. SOWERS,
Plaintiff/Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant/Appellee.

APPEAL FROM JUDGMENT OF DISTRICT COURT

I. A STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Trial Court err in ruling that SOWERS' individual contract of employment was not terminated by FEDERAL EXPRESS' ("FEDERAL") anticipatory breach and SOWERS' subsequent lawsuit?

2. Did the Trial Court err in ruling that FEDERAL'S attempted modification of the Flight Crewmembers' Handbook ("FCH") (which was agreed to by the Flight Advisory Board ("FAB") and FEDERAL management *after* the filing of this lawsuit, but never agreed to by SOWERS or any agent authorized by him) severed the legal remedies available to SOWERS?

3. Did the Trial Court err in ruling that SOWERS' continued employment by FEDERAL following the filing of this lawsuit was a waiver by him of legal remedies oth-

erwise available to him; rather than merely a reasonable and good faith attempt to mitigate his damages?

APPENDIX D

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPEAL NO. 90-14752

RICHARD M. SOWERS,
Plaintiff/Appellant,

v.

FEDERAL EXPRESS CORPORATION,
Defendant/Appellee.

APPEAL FROM JUDGMENT OF DISTRICT COURT

PETITION FOR RE-HEARING WITH SUGGESTION FOR RE-HEARING EN BANC

I. STATEMENT OF THE REASONS FOR FILING THE MOTION FOR RE-HEARING WITH SUGGESTION FOR RE-HEARING EN BANC

A. Reasons for Request for Re-Hearing

A material point of fact or law was overlooked/misapprended in the decision.

B. Reasons for Suggesting a Re-Hearing En Banc

The instant proceeding before this Court involves a question of exceptional importance going directly to the use of employer-sponsored, employee "quality circle", committees, unions, etc., such as the Flight Advisory Board (FAB)

that violate either the NLRA (29 USC 151, et seq.) or the RLA (45 USC 151-180) provisions and (in this case) strip SOWERS of *all* individual contract rights.